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Contradictory or Complimentary? Copyright Law & the Americans with Disabilities Act

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environments. Audio and visual content is particularly challenging in this respect. Video, along with transcripts, is in high demand, especially when designing learning opportunities for a multilingual audience.

We do our best to make fair use determinations when necessary, but it is challenging to provide consistent training and education regarding fair use to instructors and instructional designers. While we can explain copyright exceptions and help develop fair use best practices for different scenarios, it is very difficult to keep up with new developments in this fast-paced environment. And as we all know, Library Guides and tutorials can only go so far. Ultimately, there are some uses which require permission. However, seeking permissions from copyright holders can be complicated, time consuming, and expensive. Without dedicated staff working on identifying and securing permissions, it is not a sustainable option for most projects.

Another strategy is to develop our own content, which we do when we have no other solution. However, this does require extra time and effort on the part of instructors and instructional designers, and there isn't always enough lead time on development deadlines. We are investigating options for a learning object repository to reuse our own work and

share with others, but it is one of the many technology projects we're juggling.

Our copyright issues are compounded by the speed with which new initiatives are being generated, along with the comparatively glacial pace of change to library service models and publishing models. At the library, we've been scrambling to keep up with only one librarian specifically assigned as a liaison to EdPlus for the past year along with me as the Scholarly Communication Librarian (and copyright expert) for the university. We have plans to scale up our efforts as part of a complete reorganization, but it will take some time for these changes to take effect.

As a result, the ASU library is reaching out to our content providers to seek solutions. We'd like to explore new business models that will be mutually beneficial. We're willing to pilot new ideas, and pay for them, but we have to move beyond pricing by FTE. We're asking them to consider new possibilities for licensing resources that will allow us to meet our needs. We need to be able to provide content to users beyond currently enrolled students. We need to be able to embed content within platforms, not just link to it. We need to be able to provide consistent messaging about what can be used and how, without a complicated decision tree based on who, what, where, and how much.

These needs aren't new. Libraries and educators have struggled with many of these questions for a long time, but the pressure is increasing and time is short. We have similar

initiatives multiplying constantly, which all provide new challenges for meeting our informational resource needs. When the focus of a university extends to a global scale and builds bridges to traverse the digital divide, but the majority of the library collection is off limits, how does the library serve its purpose?

Fundamentally, the ways libraries and content providers have historically provided access to our content has to change. These initiatives are only the beginning, and ASU is certainly not alone in exploring new ways of providing education on a global scale. By working together to experiment and innovate, we can forge a path forward that will be responsive to a rapidly changing educational environment. We can create new model license terms and ways of providing content that will overcome these challenges and open educational pathways around the globe. 🌍

Endnotes

1. <https://newamericanuniversity.asu.edu/>
2. <https://newamericanuniversity.asu.edu/node/25>
3. <https://gfa.asu.edu/>
4. <https://ui.asu.edu/projects/mastercard-scholars>
5. <https://ui.asu.edu/projects/scholars-community-platform>
6. <http://solarspell.org/>
7. <https://osf.io/preprints/socarxiv/fwzph/>

Contradictory or Complimentary? Copyright Law & the Americans with Disabilities Act

by **Carla S. Myers** (Coordinator of Scholarly Communications, Miami University of Ohio) <myersc2@miamioh.edu>

In recent years numerous colleges and universities have been investigated by the United States (U.S.) Department of Education's Office for Civil Rights (OCR) and the U.S. Department of Justice (DOJ) regarding their compliance with the *Americans with Disabilities Act (ADA)*. These investigations are often initiated on behalf of students with disabilities who express concern about being unable to access and engage with learning materials and resources made available by these institutions in the same way those without disabilities can. *ADA* violations identified through these investigations include "websites, digital coursework, learning management systems, multimedia, and library resources" being "partially or completely inaccessible to students with visual, hearing, cognitive, learning, or physical disabilities."¹

Librarians need to consider accessibility issues not only because of the legal implications but also because, ethically, our profession is committed to providing "the highest level of service to all library users through... equitable service policies [and] equitable access."²

Ideally, libraries would make all items in their collection readily available in formats that would meet the needs of users with disabilities; however, practically, this would be almost impossible to do. Barriers include:

- Vendor-supplied platforms and resources that have accessibility issues.
- The small percentage of published works that are actually made available for purchase in formats that can be used by those who are blind or visually impaired, hard of hearing, who have other print disabilities, or who have mobility and dexterity impairments.
- Stagnant or shrinking budgets which impact the funding available to acquire items for library collections.

Accessibility Requests & Copyright Considerations

In response to these challenges, librarians often find that they need to start from scratch when making accessible copies of resources

available to patrons. This usually involves making a copy of the original work, modifying it in some way that creates an alternate version (e.g., a machine-readable version of a book, a captioned copy of a film), and then giving the copy of the alternate version to the patron who requested it.

U.S. copyright law (Title 17, United States Code [USC]) grants certain exclusive rights to the creators of copyrightable works, including but not limited to:

- (1) Making copies of the work;
- (2) making alternate versions (derivatives) based upon the original work; and,
- (3) distributing copies of the work to others.

Making a copy of a work, altering it for accessibility purposes, and giving (distributing) it to a patron who requested it involves taking advantage of these exclusive rights and, as such, could be considered an act of copyright infringement. In this way copyright law

continued on page 16

and the *ADA* seem to contradict each other; copyright law can be used to restrict access to works and the ways in which they are shared with others, while the *ADA* requires that librarians ensure works in the library collection are accessible to all. Fortunately exceptions have been included in U.S. copyright law that “allow the public to make limited uses of copyrighted works — uses that might otherwise constitute infringement — especially for advancing knowledge or serving other important social objectives.”⁷³ Fortunately, these exceptions are complimentary to the purpose of the *ADA* and support librarians in their legal and ethical obligations to make works in their collections accessible to those with disabilities.

Overview of Relevant Exceptions

When making alternate copies of works for accessibility purposes, the copyright exceptions most frequently utilized by academic libraries include:

- Section 107: Fair use
- Section 110(8): Exception of certain performances and displays
- Section 121: Reproduction for blind or other people with disabilities

Fair Use and Accessibility. The fair use exception found in Section 107 of U.S. copyright law allows for the reproduction of copyrighted works “for purposes such as criticism, comment, ... teaching, ... scholarship, or research.” When considering fair use “in any particular case...the factors to be considered shall include:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work” (17 USC § 107).

Guidance on applying fair use when making alternate copies of works for accessibility purposes can be found in the *Code of Best Practices in Fair Use for Academic and Research Libraries* (the Code) put forward by the **Association of Research Libraries**. The Code (2012, p. 3) “identifies...the library community’s current consensus about acceptable practices for the fair use of copyrighted materials” and explores specific situations where libraries may need to consider fair use when providing services and resources to patrons. Situation Five of the Code specifically addresses *Reproducing Material for use by Disabled Students, Faculty, Staff, and Other Appropriate Users*. Here the Code states,

When fully accessible copies are not readily available from commercial sources, it is fair use for a library to (1) reproduce materials in its collection in

accessible formats for the disabled upon request, and (2) retain those reproductions for use in meeting subsequent requests from qualified patrons.

The Code identifies “limitations” and “enhancements” that help support this application of fair use, many of which echo the statutory language found in Section 121 of U.S. copyright law (see discussion of this exception below). While the Code does not hold the force of law, it “describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations” and “it enhances the ability of librarians to rely on fair use”⁷⁴ when making accessible copies of works for patrons.

There are also legislative reports and court opinions that support the use of the fair use when making alternate copies of works for those with disabilities. A report put forward by the House Committee on the Judiciary in 1976 (No. 94-1476) regarding revisions to U.S. copyright law states:

[A] special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral readings (talking books), are not usually made by the publishers for commercial distribution. The making of a single copy or phonorecord by an individual as a free service for blind persons would properly be considered a fair use under section 107.

The 2012 opinion in the *Authors Guild, Inc., et al., v. HathiTrust* lawsuit et. al. (902 F. Supp. 2d 445 (S.D.N.Y. 2012)) issued by the **Honorable Harold Baer**, Judge for the U.S. District Court, Southern District of New York also supports the utilization of fair use when making copies of works for those with disabilities. In his opinion **Judge Baer** highlights specific benefits the **HathiTrust Digital Library (HDL)** provides for those with print disabilities and, in balancing the fair use factors in favor of the defendants (**HathiTrust**), states that “I cannot imagine a definition of fair use that would not encompass the transformative uses made by [the HDL] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the *ADA*.” On appeal, the United States Court of Appeals for the Second Circuit held that “weighing the factors together, we conclude that the doctrine of fair use allows the Libraries to provide full digital access to copyrighted works to their print-disabled patrons” 755 F.3d 87 (2d Cir. 2014).

Section 110(8) and Accessibility. This section allows for the “performance of a nondramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to blind or other handicapped persons who are unable to read normal printed material as a result of their handicap,

or deaf or other handicapped persons who are unable to hear the aural signals accompanying a transmission of visual signals” so long as the “governmental body; or...noncommercial educational broadcast station” makes the performance “without any purpose of direct or indirect commercial advantage.” This exception is fairly narrow in that it is limited to performances of nondramatic works, which the United States Copyright Office (2017) tells us includes but is not limited to “fiction, nonfiction, poetry, textbooks, reference works” and “an article published in a

serial, but ... not ... an entire issue of a periodical or other serial.” However, as these types of resources are often used in college and university classrooms it behooves libraries to be aware of this exception and the ways in which it may allow them to make performances of these works available to students with disabilities.

Section 121 and Accessibility. Also referred to as the Chafee Amendment, this statute states that “it is not an infringement of copyright for an authorized entity to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities.”

Section 121 defines the term “authorized entity” as “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.” **Judge Baer** supported academic libraries status as an “authorized entity” by stating in his opinion on the *HathiTrust* lawsuit “The *ADA* requires that libraries of educational institutions have a primary mission to reproduce and distribute their collections to print-disabled individuals, making each library a potential ‘authorized entity’ under the Chafee Amendment” (902 F. Supp. 2d 445 (S.D.N.Y. 2012)).

The Chafee Amendment is somewhat limited in that it can be utilized only when making accessible copies of “previously published, nondramatic literary work[s]” (17 USC § 121). Therefore, if librarians are asked to make accessible copies of unpublished nondramatic works, dramatic literary works “such as a screenplay, play or other script” (United States Copyright Office, 2017), or any other type of copyrightable work (e.g., an audiovisual work) they would have to consider using one of the other exceptions. Additionally, copies made under this statute must:

- (A) “not be reproduced or distributed in a format other than a specialized format exclusively for use by blind or other persons with disabilities;
- (B) bear a notice that any further reproduction or distribution in a format other than a specialized format is an infringement; and

continued on page 18

(C) include a copyright notice identifying the copyright owner and the date of the original publication” (17 USC § 121).

Librarians should not let these limitations or requirements prevent them from utilizing this exception when applicable, especially as the courts have validated its use in making accessible copies of works available to those with disabilities. **Judge Baer** states in his opinion on the *HathiTrust* lawsuit “the provision of access to previously published non-dramatic literary works within the HDL fits squarely within the Chafee Amendment” (902 F. Supp. 2d 445 (S.D.N.Y. 2012)).

Other Considerations — International Treaties. *The Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or Otherwise Print Disabled* (Treaty) entered into force on September 30, 2016 and requires signatory countries (of which the U.S. is one) to adopt limitations and exceptions into their copyright law that allows the making of accessible copies of works, the “cross-border sharing of these accessible formats, ... and the importation of works created in other languages.”⁵ Writing on behalf of the **Library Copyright Alliance**, **Jonathan Band** has published *A User Guide to the Marrakesh Treaty*.⁶ In the document, **Band** provides an overview of the issues that brought about the Treaty, works through the Treaty’s provisions, and identifies ways in which U.S. copyright law complies with the Treaty. The guide should be reviewed by all library staff and employees who are involved in making accessible copies of works for patrons as it can greatly aid them in understanding and applying the Marrakesh Treaty to these situations.

Exceptions in Action

The “Framework for Analyzing any U.S. Copyright Problem”⁷ developed by **Smith**,

Macklin, and **Gilliand** can help librarians begin to work through copyright considerations when presented with a request for an accessible format of a work held in the library’s collection. When librarians reach question #2 that asks “Is there a specific exception in copyright law that covers my use?” they can consider the exceptions found in Sections 107, 110(8), and 121 of U.S. copyright law as well as the provisions of the Marrakesh Treaty. In the event that the making of an accessible copy does not fall under one of these exceptions **Smith** and **Macklin** outline other options librarians can consider, including obtaining permission or a license from the rightsholder to make the alternate copy.

An important consideration included in **Smith** and **Macklin’s** framework is the licensing of library resources. When entering into a contract with vendors, librarians should ensure there is no language in the license agreement barring the creation of alternate versions of works or prohibiting library employees from taking advantage of the exceptions found in U.S. copyright law as this would prevent them from making accessible versions of works for those with disabilities in the manner outlined here. The library’s legal counsel can assist librarians in reviewing and negotiating vendor contracts as well as provide guidance on interpreting and applying copyright law when making accessible copies of resources. Librarians can also find additional information on copyright and accessibility issues by reaching out to fellow librarians who specialize in these areas and by participating in educational opportunities such as webinars and conference sessions that are provided by knowledgeable and reputable instructors.

Dealing with any legal situation can be daunting, however the complimentary nature of the *ADA* and the exceptions found in U.S. copyright law allows librarians to balance their ethical obligations to provide equitable access to all users while at the same time showing “respect [for the] intellectual property rights”

of content creators.⁸ The next steps in resolving resource accessibility issues must involve getting rightsholders and vendors to provide accessible versions of resources up-front to help eliminate the delays caused by converting the non-accessible resources into accessible ones. By collaborating with those patrons who have disabilities to address this issue as well as maintaining an open dialogue on the services, tools, and resources that are most beneficial to them, librarians can help set the example for others regarding the importance of accessibility in all facets of our society. 🌸

Endnotes

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Grey Literature, Experimental Works, and Shifting Roles: Case Studies, Opportunities, and Legal Challenges around Students as Producers

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Introduction

Traditionally, libraries have served as both disseminators and preservers of knowledge, often providing services and support that focus on completed works and information sharing. At the same time libraries have always played a part in supporting information creation, but in recent years libraries seem to be taking a more active role in directly working and collaborating with users,¹ and in particular students, to create knowledge in new and experimental

ways. In the **North Carolina State University (NCSU) Libraries**, we have been actively engaging with students and faculty to facilitate the creation and display of student works across formats, mediums, and disciplines, and our students consistently amaze and delight us with creative and high quality productions. From scholarly papers to audio recordings, videos and film to 3D-printed products, computer code and circuit work, students are creating works that include traditional mediums, as

well as emerging ones, with many works being a blend of both.

By providing students with tools, collaborative and high-tech spaces, and expert support, libraries can enable students to more fully participate in the scholarly enterprise, as well as contribute to the shift in the role of students from consumers to producers of knowledge. This type of paradigm shift, however, is not without challenges, and can often affect unan-

continued on page 20